

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

JOHNNY LEE WICKS,

Plaintiff,

vs.

SOCIAL SECURITY ADMINISTRATION,

Defendant.

Case No. 2:08-cv-00288-PMP-GWF

**FINDINGS AND
RECOMMENDATION**

Motion to Dismiss (Dkt. #35)

This matter is before the Court on Defendants' Motion to Dismiss (Dkt. #35), filed May 29, 2009; the Declaration of Daisy Molina in Support of Defendants' Motion to Dismiss (Dkt. #36), filed June 3, 2009; and Plaintiff's Opposition to the motion to dismiss (Dkt. #39), filed June 5, 2009. The Court scheduled a hearing on August 17, 2009 for oral argument on this matter. Carlos Gonzalez, counsel for Defendant Social Security Administration, was present in Court at the time appointed for a hearing, but Plaintiff failed to appear.

DISCUSSION

I. Background

Plaintiff alleges that he moved from California to Nevada in January 2008. (Dkt. #3 at 4). In his Complaint, Plaintiff states he called the Social Security Administration ("SSA") Nevada Office soon after his move to change his address and an SSA representative informed Plaintiff that his monthly benefits would be reduced as a result of Plaintiff moving to Nevada. (*Id.* at 4-5). In the motion to dismiss, the SSA states that while residing in California, Plaintiff received a California State Supplement to his Federal SSI benefits, which California elected to provide under the optional state supplementary payment provision of 42 U.S.C. § 1382(e). (Dkt. #35 at 2-3). While he was a California resident, Plaintiff received \$317 a month in California state supplements in addition to the \$128 per

1 month in Federal SSI payment. (*Id.*) When Plaintiff moved to Nevada and informed the Nevada
2 District SSA office of his change of residency, the SSA explained that Plaintiff would no longer receive
3 the California state supplement and his monthly benefits would be reduced as he was no longer a
4 resident of California. (*Id.* at 3).

5 However, Plaintiff alleges that the reduction in his benefits is based on race discrimination.
6 (*Id.*) According to the Complaint, Plaintiff talked with John Doe II, SSA Case Manager, and was
7 informed that his benefits would be reduced by February 2008. (*Id.* at 4-6). According to Plaintiff, the
8 SSA violated the appeals rule by reducing his SSA benefits because “the rules” state that the SSA will
9 not reduce SSA benefits if a party appeals the SSA decision within ten (10) days. (*Id.*) Plaintiff alleges
10 that he wrote to John Doe I, SSA Office Manager, asked her why the Nevada SSA Office violated the
11 SSA rules. (*Id.* at 5-6). On January 15, 2008, Plaintiff met with John Doe II, who was allegedly
12 disrespectful and told Plaintiff to move back to California. (*Id.* at 4-6). Plaintiff further alleges that
13 John Doe III, SSA phone staff, called Plaintiff’s apartment manager and asked the apartment manager
14 not to help Plaintiff. (*Id.* at 5-6).

15 On February 5, 2008, Plaintiff received a notice from the SSA Nevada Office stating that
16 Plaintiff had been overpaid SSA benefits. (*Id.* at 6). According to the Complaint, the SSA Nevada
17 Office asked Plaintiff to repay \$317.00 for overpayment and informed Plaintiff that it would withhold
18 \$63.70 a month beginning in May 2008. (*Id.*) As a result, Plaintiff filed his civil rights complaint
19 pursuant to 42 U.S.C. § 1983 and Application to Proceed *In Forma Pauperis*.

20 On April 2, 2008, the Court screened Plaintiff’s complaint, construing it as a petition for judicial
21 review of a final agency decision rather than a § 1983 action¹ because Courts have limited jurisdiction
22 to hear claims against the SSA. “Federal courts only have jurisdiction to conduct judicial review of
23 SSA decisions”. (Dkt. #2); *see* 42 U.S.C. § 405(g); *Pacific Coast Medical Enterprises v. Harris*, 633

24
25 ¹ Had the Court screened Plaintiff’s complaint as alleging a § 1983 claim against the SSA, the
26 Court would have dismissed Plaintiff’s Complaint as a federal agency is not a state actor for the
27 purposes of a § 1983 claim. *See Wyatt v. Cole*, 504 U.S. 158, 161 (1992) (stating that the “purpose of §
28 1983 is to deter state actors from using the badge of their authority to deprive individuals of their
federally guaranteed rights”); *Howlett v. Rose*, 496 U.S. 356, 365 (1990) (finding a government agency
that is an arm of the state is not a person for the purposes of § 1983).

1 F.2d 123, 137 (9th Cir. 1980). In his Complaint, Plaintiff requested that the Court reinstate his social
2 security benefits to the original monthly amount of \$886.00. As a result, the Court allowed the
3 complaint to proceed as a petition for judicial review of the Social Security Administration's decision to
4 reduce Plaintiff's benefits. (Dkt. #2). At the time, however, the Court noted that it was unclear whether
5 Plaintiff exhausted his administrative remedies with the SSA and that the case may be subject to
6 remand to the SSA. (*Id.*)

7 Defendant SSA argues that Plaintiff's Complaint should be dismissed with prejudice as the
8 Court does not have subject matter jurisdiction over Plaintiff's Complaint due to Plaintiff's failure to
9 exhaust his administrative remedies. As support for the motion to dismiss, Defendant submits the
10 Declaration of Daisy Molina, District Manager of the SSA's Las Vegas District Office. (Dkt. #37).
11 Ms. Molina states that on January 25, 2008 Plaintiff submitted a written request for reconsideration of
12 the SSA's decision to reduce his monthly benefits as a result of his move to Nevada from California.
13 (*Id.* at 3). Six months later, on July 29, 2008, the SSA denied Plaintiff's request for reconsideration.
14 (*Id.*) The written denial notice included information on Plaintiff's right to appeal the SSA decision by
15 requesting a hearing before an administrative law judge ("ALJ") within sixty (60) days from receipt of
16 the notice. (*Id.*) The declaration also states that as of May 28, 2009, Plaintiff had still not requested an
17 ALJ hearing or an extension of time to do so. (*Id.*)

18 II. Standard for Subject Matter Jurisdiction

19 The United States is immune from suit unless it consents to waive its sovereign immunity.
20 *Lehman v. Nakshian*, 453 U.S. 156, 160 (1981). The terms of the United States' consent to be sued in
21 any court define that court's jurisdiction to entertain the suit. *Id.*; *Hodge v. Dalton*, 107 F.3d 705, 707
22 (9th Cir. 1997). The doctrine of sovereign immunity applies to federal agencies and to federal
23 employees acting within their official capacities. *Hodge*, 107 F.3d at 707. Any waiver of immunity
24 must be "unequivocally expressed," and any limitations and conditions upon the waiver "must be
25 strictly observed and exceptions thereto are not to be implied." *Lehman*, 453 U.S. at 160-61 (finding
26 the party suing the federal government must identify "an unequivocal waiver of immunity" by the
27 government).

28 ...

1 Congress included a limited waiver of sovereign immunity within the Social Security Act,
2 which provides jurisdictional basis for the Court to review final administrative decisions concerning
3 claims “arising under” the Act. 42 U.S.C. § 405(g) and (h). However, as a prerequisite to the Court’s
4 having subject matter jurisdiction over claims against the SSA, section 405(g) requires a final decision
5 of the Commissioner after exhaustion of a claimant’s administrative remedies. *See* 42 U.S.C. § 405(g).
6 Under the statutory framework, Plaintiff’s claim must arise under the Act and Plaintiff must have
7 exhausted his administrative remedies before the Court has jurisdiction over the matter.

8 **1. Plaintiff’s claims arise under the Social Security Act**

9 A claim arises under the Social Security Act when the plaintiff seeks to recover Social Security
10 benefits or when the Act “provides both the standing and the substantive basis for” the claim.
11 *Weinberger v. Salfi*, 422 U.S. 749, 760-61 (1975). Claims “arise under” the Act “where an individual
12 seeks a monetary benefit from the agency (say, a disability payment, or payment for some medical
13 procedure), the agency denies the benefit, and the individual challenges the lawfulness of that denial”.
14 *Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 10 (2000). Such a claim related to a
15 monetary benefit “arises under” the Act “irrespective of whether the individual challenges the agency’s
16 denial on evidentiary, rule-related, statutory, constitutional, or other legal grounds.” *Id.* at 10.

17 Plaintiff’s claims arise under the Social Security Act because Plaintiff is seeking a monetary
18 benefit through bringing this action. Plaintiff’s complaint seeks the reinstatement of Plaintiff’s monthly
19 benefits to the same level as when Plaintiff lived in California. In doing so, Plaintiff is specifically
20 seeking that the Court review the SSA’s decision regarding his benefits and grant Plaintiff a monetary
21 benefit by reversing the SSA’s reduction of his monthly benefits. Therefore, Plaintiff’s claims arise
22 under the Act.

23 In addition, Plaintiff’s claims “arise under” the Act because the Act provides the standing and
24 substantive basis of his claim. Plaintiff seeks to reverse the decision of the SSA regarding his benefits
25 as contrary to rules promulgated under the Social Security Act. Under 42 U.S.C. § 405(g) and (h),
26 Plaintiff has standing to seek judicial review of the SSA’s decision where his benefits have been
27 affected by a decision of the SSA. The Act also provides the substantive basis for Plaintiff’s claim that
28 his benefits have been improperly reduced. The SSA administers California state supplemental

1 payments under the Act as authorized by 42 U.S.C. § 1382e. Cal. Welf. & Inst. Code § 12100. SSA
 2 regulations promulgated under the Social Security Act govern the procedures and administration of
 3 Federally-administered state supplemental payment programs. *See* 20 C.F.R. §§ 416.1400-1403 (2009)
 4 (defining SSA's initial determination and appeals process under a federally-administered state
 5 supplemental payment program); 416.2005(d) (stating the SSA regulations for the SSI program apply to
 6 Federally-administered state supplemental payment programs). Plaintiff's claims challenge the SSA's
 7 administration of the California state supplemental payment as authorized by and procedurally governed
 8 by the Social Security Act. As a result, the Social Security Act provides the standing and substantive
 9 basis for Plaintiff's claim that his monthly benefits should be restored to the level he received when he
 10 resided in California. Therefore, Plaintiff's action arises under the Act and Plaintiff must have
 11 exhausted his administrative appeals in order for the Court to have jurisdiction over his claims. 42
 12 U.S.C. § 405(g) and (h).

13 **2. Plaintiff's Failure to Exhaust His Administrative Remedies**

14 In order for the Court to have jurisdiction over a claim "arising under" the Social Security Act,
 15 the plaintiff must have exhausted the administrative remedies set forth in 42 U.S.C. § 405(g). Under
 16 42 U.S.C. § 405(g), a civil action against the SSA may be brought only after (1) the claimant has been
 17 party to a hearing held by the Commissioner of Social Security and (2) the Commissioner has made a
 18 final decision on the claim. *Califano v. Sanders*, 430 U.S. 99, 108 (1977). The SSA has promulgated
 19 regulations under the hearing and final decision requirements of 42 U.S.C. § 405(g), which establish a
 20 four-step process of administrative review that must be undertaken before a court may review the
 21 agency's decision: 1) initial determination, 2) reconsideration of the determination, 3) hearing before an
 22 administrative law judge and 4) appeals council review. 20 C.F.R. §416.1400. Here, Plaintiff has
 23 never sought a hearing before an ALJ after the SSA denied his request for reconsideration and the
 24 appeals council has never reviewed his claim and issued a final decision. (Dkt. #37 at 3). As a result,
 25 Plaintiff has failed to exhaust the administrative procedures and appeals under 42 U.S.C. § 405(g) and
 26 (h). Due to Plaintiff's failure to exhaust his administrative remedies, this Court finds it does not have
 27 jurisdiction to review the SSA's decision regarding Plaintiff's monthly benefits and will recommend
 28 that the District Judge dismiss this matter with prejudice.

1 Plaintiff has filed a Motion for Default Judgment (Dkt. #33) and Motion for Final Judgment
2 (Dkt. #34). Based on the discussion above, the Court will recommend that the District Judge deny
3 Plaintiff's motions. Accordingly,

4 **IT IS HEREBY RECOMMENDED** that Defendants' Motion to Dismiss (Dkt. #35) should be
5 **granted** and Plaintiff's Complaint **dismissed with prejudice** as the Court does not have jurisdiction to
6 review the decision of the Social Security Administration based on Plaintiff's failure to exhaust his
7 administrative remedies.

8 **IT IS FURTHER RECOMMENDED** that Motion for Default Judgment (Dkt. #33) and
9 Motion for Final Judgment (Dkt. #34) should be **DENIED**.

10 **NOTICE**

11 Pursuant to Local Rule IB 3-2, any objection to this Finding and Recommendation must be in
12 writing and filed with the Clerk of the Court within ten (10) days. The Supreme Court has held that the
13 courts of appeal may determine that an appeal has been waived due to the failure to file objections
14 within the specified time. *Thomas v. Arn*, 474 U.S. 140, 142 (1985). This circuit has also held that (1)
15 failure to file objections within the specified time and (2) failure to properly address and brief the
16 objectionable issues waives the right to appeal the District Court's order and/or appeal factual issues
17 from the order of the District Court. *Martinez v. Ylst*, 951 F.2d 1153, 1157 (9th Cir. 1991); *Britt v. Simi*
18 *Valley United Sch. Dist.*, 708 F.2d 452, 454 (9th Cir. 1983).

19 DATED this 17th day of August, 2008.

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21 **GEORGE FOLEY, JR.**
22 **UNITED STATES MAGISTRATE JUDGE**
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